Malaysian Newsprint Industries Sdn Bhd v Perdana Cigna Insurance Bhd & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–652 OF 2005
SURIYADI, ZAINUN ALI AND WAN ADNAN MUHAMAD JJCA
5 NOVEMBER 2007

Civil Procedure — Suitability of O 14A Rules of the High Court — Necessity of a full trial

Contract — Construction of terms of contract — Plain and ordinary meaning — Interpretation of terms and conditions of insurance policy

Contract — Exemption clause — Insurance clause — Whether exclusion clause was clear and consistent

The appellant's core business is in the manufacture and supply of newsprint which is manufactured at its facility (the 'newsprint mill') constructed at Lot 3771 in the Mukim of Mentakab situated at the Temerloh Industrial Estate in Pahang. The construction of the newsprint mill commenced on or about February 1997 and was initially expected to be completed on or about October 1998. In order to insure against any loss that may occur in respect of it, the appellant had requested that the respondents insure the newsprint mill by way of Policy No 1IE-809415/97 executed by the first, second, and third respondents on 1 July 1997, 4 July 1997 and 30 July 1997 respectively (the 'Policy'). It insured inter alia the appellant in respect of loss and damage that includes the above newsprint mill.

Pursuant to the policy, the respondents agreed, inter alia and subject to the terms, conditions and exclusions of the policy, to indemnify the appellant for (i) s 3(a) of the Policy in respect of physical loss of or damage to the Newsprint Mill arising during the Policy Period, s 4(b) of the Policy in respect of the continued payment of standing charges plus increased cost of working as specified in the Policy in consequence of interference in the construction of the Newsprint Mill ('the Interference') resulting in a delay to the scheduled date of commencement of the appellant's business at the Newsprint Mill ('the Delay') provided that the interference and delay were caused by physical loss of or damage to the Newsprint Mill which is indemnifiable under s 3(a) of the Policy.

A The appellant's contractors undertook the bored pile foundation ('Bored Pile Foundation') and pile cap works ('the Foundation Works') and the construction of the columns, floor slabs and superstructure ('the Superstructure Works') for those parts of the Newsprint Mill which were to house the paper machine, ancillary equipment and stock preparation plant. B After completing the Foundation Works and prior to completing the Superstructure Works the appellant discovered that the Bored Pile Foundation was unable to withstand the design load ('the Defects').

The defects were caused by or resulted from defects in the design materials or C workmanship of the Newsprint Mill. The appellant rectified the defects by installing 388 micropiles around and through the pile cap in the area where the paper machine was to be located so as to increase the load carrying capacity of the Bored Pile Foundation in that area ('the Rectification Works'). In the course of undertaking the rectification works, the appellant broke and D removed some parts of the surrounding reinforced concrete floors and floor drains and the subfloor fill above and around the pile cap.

The appellant made a claim under the policy and filed the above application, praying for a declaration that the loss and damage suffered by it, arising from the defective design materials were covered under the abovementioned E Project Insurance Policy No H809415/97. The appellant had further prayed that the loss and damage or any other loss recoverable under the said policy be ascertained, determined and assessed by the court at the trial of the action; and that the respondents do pay to the appellant in certain proportions viz. the first respondent to pay 75% for loss and damage and the second and third F respondents to each pay 12.5% together with interest thereon from such date and at such rate as the court thinks fit.

The appellant's application at the High Court on all the questions of law posed were answered in the negative. That being so, the respondents were not liable to indemnify the appellant for the physical loss and damage allegedly G suffered for all the rectification works and delay. The appellant appealed to the Court of Appeal.

H **Held,** dismissing the appeal and affirming the orders of the High Court:

(1) That when interpreting the meaning of the words used in a contract they should be construed in their grammatical and ordinary meaning, except to the extent that some modification is necessary in order to I avoid absurdity, inconsistency or repugnancy (see para 26).

(2) That as the issues of latent defects and latent damage did not arise here, and all the alleged losses therefore cannot be indemnified in the circumstances of the case. On the current facts, there was nothing latent in the physical loss, as all the damage and losses were the natural and

direct consequence of an intentional acknowledged usage of defective design materials by the appellant. The losses, which were foreseeable and anticipatory, emanated from the very act of the insured. The appellant should divert its claim for losses to some other responsible party. The appellant therefore must fail in its attempt to recover any compensation under the policy (see para 32).

(3) That it is well established principle that the onus lies on the insurer, if it wishes to seek solace from an exclusion clause. However, it is still incumbent upon the insured to establish its case and unless established, the appellant here would achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract (see para 29).

(4) That to deny the legitimacy and effectiveness of an exclusion clause for which it was designed, would render it meaningless. The exclusion clause was clear and the words used were easily definable, with no absurdity, inconsistency or repugnancy when arriving at a straightforward interpretation (see para 37).

[Bahasa Malaysia summary

Perniagaan utama perayu adalah mengilang dan membekalkan kertas akhbar yang telah dikilangkan dikemudahannya ('kilang kertas akhbar') yang dibina di Lot 3771 dalam Mukim Mentakab yang terletak di Temerloh Industri Estet di Pahang. Pembinaan kilang kertas akhbar bermula pada atau sekitar Februari 1997 dan pada mulanya dijangkakan siap pada atau sekitar Oktober 1998. Bagi tujuan menginsuranskan daripada sebarang kerugian yang mungkin terjadi berkaitan dengannya, perayu telah meminta responden menginsuranskan kilang kertas akhbar melalui No. Polisi 1IE-809415/97 yang disempurnakan oleh responden pertama, kedua dan ketiga masing-masing pada 1 July 1997, 4 July 1997 dan 30 July 1997 ('Polisi'). Ia diinsuranskan antara lain bahawa perayu jika ada sebarang kerugian dan kerosakan berkaitan kilang kertas akhbar seperti di atas.

Menurut polisi, responden bersetuju, antara lain dan tertakluk kepada terma-terma, syarat-syarat dan pengecualian polisi untuk melindungi perayu untuk (i) s 3(a) Polisi berkenaan dengan kerugian fizikal atau kerosakan kepada Kilang Kertas Akhbar yang timbul semasa Tempoh Polisi, s 4(b) Polisi berkenaan dengan pembayaran bersambung bayaran-bayaran sedia ada bersama dengan pertambahan kos kerja sebagaimana diperincikan dalam polisi jika ada campur tangan dalam pembinaan Kilang Kertas Akhbar ('Campur tangan') yang menyebabkan kelewatan kepada tarikh yang dijadualkan untuk perayu memulakan perniagaan di Kilang Kertas Akhbar ('Kelewatan'), jika Campurtangan dan Kelewatan disebabkan oleh kerugian fizikal atau kerosakkan kepada Kilang Kertas Akhbar yang tidak boleh ditanggung di bawah s 3(a) Polisi.

A Kontraktor perayu telah menjalankan penanaman tiang cerucuk asas ('Tiang Cerucuk Asas') dan kerja-kerja penutup cerucuk ('Kerja-kerja Asas') dan pembinaan tiang-tiang, kepingan-kepingan lantai dan struktur-struktur besar ('Kerja-kerja Struktur Besar') untuk bahagian-bahagian Kilang Kertas Akhbar yang akan meletakkan mesin kertas, peralatan sampingan dan loji
B penyediaan stok. Selepas menyiapkan Kerja-kerja Asas dan sebelum menyiapkan Kerja-kerja Struktur Besar, perayu mendapati bahawa Tiang Cerucuk Asas tidak dapat menampung beban rekaan ('Kecacatan').

Kecacatan disebabkan oleh dan berpunca daripada kecacatan dalam bahan
C reka bentuk atau kemahiran kerja tangan Kilang Kertas Akhbar. Perayu telah membaiki Kecacatan dengan memasukkan 388 cerucuk mikro disekitar dan melalui kawasan penutup cerucuk di mana mesin kertas akan diletakkan bagi menambah keupayaan membawa beban Tiang Cerucuk Asas dalam kawasan itu ('Kerja-kerja Pembaikkan'). Dalam masa menjalankan kerja-kerja
D pembaikkan, perayu telah mematahkan dan membuang bahagian-bahagian tertentu di sekitar lantai konkrit yang diperkukuhkan dan saliran lantai dan lantai bawah yang dipenuhi di atas dan sekitar penutup cerucuk.

Perayu membuat tuntutan di bawah polisi dan memfailkan permohonan
E di atas, memohon untuk perisytiharan bahawa kerugian dan kerosakkan yang dialaminya, berpunca daripada kecacatan bahan-bahan rekabentuk telah dilindungi di bawah Polisi Projek Insurans No. H809415/97 di atas. Perayu seterusnya memohon bahawa kerugian dan kerosakkan atau sebarang kerosakkan yang boleh dikembalikan di bawah polisi tersebut dipastikan,
F ditentukan dan dinilai oleh mahkamah semasa perbicaraan tindakan dan bahawa responden-responden hendaklah membayar kepada perayu dalam kadar tertentu iaitu responden pertama membayar 75% untuk kerugian dan kerosakkan, dan responden-responden kedua dan ketiga masing-masing membayar 12.5% bersama dengan faedah berikutnya daripada tarikh
G tertentu dan pada dasar tertentu yang difikirkan perlu oleh mahkamah.

Permohonan perayu di Mahkamah Tinggi ke atas kesemua persoalan undang-undang yang diajukan telah dijawab secara negatif. Berikutan dengan itu, responden-responden tidak bertanggungjawab untuk melindungi perayu untuk kerosakan fizikal dan kerosakan yang dikatakan telah dialami untuk
H kesemua kerja-kerja pembaikkan dan kelewatan. Perayu merayu kepada Mahkamah Rayuan.

I **Diputuskan,** menolak rayuan dan mengesahkan perintah-perintah Mahkamah Tinggi:

(1) Apabila mentafsirkan maksud perkataan-perkataan yang digunakan dalam kontrak, ia haruslah ditafsirkan dalam nahunya dan dalam maksud biasa kecuali sehinggalah sesetengah pengubahsuaian

diperlukan bertujuan mengelakkan ketidakmunasabahan, tidak konsisten atau bertentangan (lihat perenggan 26).

(2) Berkenaan dengan isu-isu kecacatan terpendam dan kerosakan terpendam tidak timbul di sini, dan kesemua kerugian yang dikatakan oleh itu tidak dapat dilindungi dalam keadaan-keadaan kes. Berdasarkan kepada fakta-fakta terkini, tidak ada langsung terpendam dalam kerugian fizikal kerana kesemua kerosakan dan kerugian adalah semulajadi dan kesan terus daripada niat yang diketahui ekoran penggunaan bahan-bahan rekabentuk yang cacat oleh perayu. Kerugian yang boleh dilihat dan dijangka, datang daripada perbuatan menginsuranskan. Perayu sepatutnya mengalihkan tuntutannya untuk kerugian kepada pihak yang bertanggungjawab. Perayu, oleh itu akan gagal dalam cubaanya untuk mendapatkan kembali sebarang pampasan di bawah polisi (lihat perenggan 32).

(3) Ia adalah prinsip sedia ada bahawa beban terletak pada syarikat insurans, jika mereka hendak mencari penawar daripada klausa pengecualian. Walaubagaimanapun, ia adalah masih bertahan kepada pengambil insurans untuk mewujudkan kesnya dan melainkan diwujudkan, perayu di sini akan berjaya mendapatkan kembali yang mungkin tidak wajar dipohon atau dijangka pada masa kontrak (lihat perenggan 29).

(4) Untuk menafikan kesahan dan keberkesanan klausa pengecualian, untuk itu ia direkabentuk, akan menjadikan ia tidak bermakna. Klausa pengecualian adalah jelas dan perkataan-perkatan yang digunakan adalah mudah ditafsirkan, dengan munasabah, konsisten atau tiada pertentangan apabila mencapai kepada interpretasi yang jelas dan mudah (lihat perenggan 37).]

Notes

For case on plain and ordinary meaning of terms of contract, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 3170.

For the case on insurance clause, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3579.

Cases referred to

BC Rail Ltd v American Home Assurance Co [1991] 79 DLR (refd)

British and Foreign Marine Insurance Company Limited v Gaunt [1921] 2 AC 41 (refd)

Canadian National Railway Co v Royal and Sun Alliance Insurance Co of Canada [2007] OJ No 1077 (refd)

Lips Maritime Corporation v National Maritime Agencies Co [1986] 6 Llyod's 641 (refd)

Moore v Evans [1918] AC 185 (refd)

A *Morello Sdn Bhd v Jacques (International) Sdn Bhd* [1995] 1 MLJ 577 (refd)
Siang Hoa Goldsmith Pte Ltd v The Wing On Fire & Marine Insurance Co Ltd [1998] 2 SLR 777 (refd)

Legislation referred to

B Rules of the High Court 1980 O 14A, O 18 r 19

WM Chang (HL Choon with him) (Raja, Darryl & Loh) for the appellant.
Porres P Royan (M. Nagarajah and C Niles with him) (Shook Lin & Bok) for the respondent.

C **Suriyadi Halim Omar JCA:**

[1] This appeal, allowed by this panel was pursuant to an order made by the High Court, dismissing an application sought by the plaintiff (hereinafter D referred to as the appellant). This application was initially commenced by summons-in-chambers in 1999 later to be converted into a writ by way of a court order on 13 March 2002. Upon completion of the analysis of the pleadings, the parties proceeded by way of O 14A of the Rules of the High Court 1980 for determination of issues of law relating to the construction of E insurance policy number 11E-809415/97 issued by the defendants (hereinafter referred to as the respondent).

[2] Order 14A reads as follows:

F (1) Determination of questions of law or construction (O 14A r 1)

(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where G it appears to the Court that:

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or H matter or any claim or issue therein.

(2) Upon such determination the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless I the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by Registrar.

(5) Nothing in this Order shall limit the powers of the Court under O 18 r 19 or any other provision of these rules.

(2) Manner in which applications under rule 1 may be made (O 14A r 2)

An application under rule 1 may be made by summons or motion or (notwithstanding O 32 r 1) may be made orally in the course of any interlocutory application to the Court.

[3] The application/summons-in-chambers of the appellant reads as follows:

(1) That the Court determines the following questions/issues relating to the construction of Insurance Policy No 1IE-809415/97 ('the Policy'):

(1.1) In respect of s 3(a) of the Policy which reads inter-alia as follows:

> The Insurers will indemnify the Insured in respect of physical loss of or damage to any of the Insured Property described in the Schedule arising during the Period of Insurance from ANY CAUSE WHATSOEVER other than as hereinafter provided …
>
> Whether the words 'physical loss of or damage to any of the Insured Property' should be interpreted to include:
>
> (a) any latent damage and/or economic damage to the plaintiff's newsprint production facility on the plaintiff's land held under Lot 3771 in the Mukim of Mentakab situated at the Temerloh Industrial Estate in Pahang ('the Newsprint Mill'); and
>
> (b) the Collateral Damage referred to in para 29 of the amended statement of claim ('the said Collateral Damage').

(1.2) In respect of clause 7 ('Exclusion Clause 7') of the exclusions to the indemnity given under s 3(a) of the Policy which reads as follows:

> PROVIDED ALWAYS that the indemnity granted by this section of the Policy shall exclude:
>
> 7. All costs necessary to replace repair or rectify any defect in design materials or workmanship but should unintended damage result from any such defect this exclusion shall be limited to the additional costs of improvements to the design.
>
> (a) Whether Exclusion Clause 7 is void and unenforceable;
>
> (b) Whether the words 'unintended damage' should be interpreted to include the said Collateral Damage and if so

whether the ambit of the exclusion in Exclusion Clause 7 would be limited to the additional costs of improvements to the design.

(2) That upon determination of the above said questions/issues that the following orders be made:

(2.1) A declaration that the loss and damage suffered by the plaintiff ('the said Loss and Damage' howsoever arising from the defective foundation in respect of the Newsprint Mill is covered under ss 3(a) and 4(b) of the Policy;

(2.2) That the said Loss and Damage or any other loss suffered by the plaintiff which is recoverable under ss 3(a) and 4(b) of the Policy be ascertained, determined and assessed by the Court;

(2.3) That the defendants do pay to the plaintiff the loss and damage so ascertained, determined and/or assessed by the Court in the following proportion: The grounds of this application are inter alia as follows:

(1) The above said questions/issues relating to the construction of the Policy is suitable for determination without full trial.

(2) Such determination will finally determine the entire cause and matter of the present action….

[4] Herewith, and for completeness, I reproduce para 29 of the amended statement of claim (collateral damage issue) and s 4(b) of the policy, which will be discussed in the course of this judgment:

> It was necessary in the course of the rectification work to damage and remove portions of the building of the Newsprint Mill ('the Collateral Damage') in order to have the micropiles installed. In particular, access to the 2 metre thick pile cap to enable the installation of some of the micropiles could only be achieved by damaging and removing the surrounding reinforced concrete floors and floor drains, and the subfloor fill above and around the 2 metre thick pile cap.

[5] Section 4(b) of the policy reads:

> The Insurers hereby agree with the Insured that if any time during the period of insurance as stated in the Schedule….the contract works or any part thereof… suffers loss or damage indemnifiable under section 3(a) of this policy, unless specifically excluded in this section, thereby causing interference in the construction work resulting in a delay to the scheduled date of commencement of the insured business, the Insurers shall… indemnify the Insured in the manner and to the extent as hereinafter defined.

[6] By the dismissal of the appellant's application at the High Court all questions of law posed by the appellant had been answered in the negative. That being so the respondents were not liable to indemnify the appellant for the physical loss and damage allegedly suffered for all the rectification works and delay.

BACKGROUND OF THE APPLICATION AS EXPRESSED IN THE PLEADINGS

[7] The pleadings had revealed that the appellant is a company incorporated in Malaysia with its registered address found at Level 9, Wisma Hong Leong, No 18, Jalan Perak, 50450 Kuala Lumpur. Its core business is in the manufacture and supply of newsprint, manufactured at its facility ('the newsprint mill') constructed at Lot 3771 in the Mukim of Mentakab situated at the Temerloh Industrial Estate in Pahang.

[8] Construction of the newsprint mill commenced on or about February 1997 and was initially expected to be completed on or about October 1998. In order to insure against any loss that may occur in respect of it, the appellant had requested the respondents to insure the newsprint mill by way of Policy No 1IE-809415/97 executed by the first, second, and third respondents on 1 July 1997, 4 July 1997 and 30 July 1997 respectively ('the policy'). It insured inter alia the appellant in respect of loss and damage that includes the above newsprint mill.

[9] The premium charged by the respondents for the policy was RM6,978,343.75 which premium was duly paid. Upon the expiry of the policy, it was extended to expire on 31 December 1998 and extended again to expire on 22 March 1999 for additional premiums of RM726,000 and RM875,000 respectively which additional premiums were also duly paid.

[10] Prior to the construction of the newsprint mill the appellant had engaged Messrs Barwood Parker Australia Pty Ltd ('BPA') to design the foundation. In this regard, BPA's foundation design required, inter-alia, the installation of 278 bored piles each having a diameter of 750 mm in respect of the foundation ('the Bored Pile Foundation') for those parts of the newsprint mill, which would house the machinery for the paper machine, ancillary equipment and stock preparation plant. In respect of the bored piles, BPA had designed each of these piles to be able to carry a load of 650 tonnes with an ultimate carrying capacity of 925 tonnes.

[11] By way of a letter of intent dated 5 February 1997 followed inter-alia by a contract agreement dated 6 October 1997, the appellant engaged Pembinaan Mitrajaya Sdn Bhd ('PMSB') to perform, inter-alia, the

substructure, piling and pile cap works ('the foundation works') in respect of the newsprint mill. PMSB commenced the foundation works on or about February 1997 and completed the same on or about May 1997. By way of a separate letter of award dated 17 April 1997 followed by a separate contract dated 6 October 1997, PMSB was also engaged by the appellant to construct the superstructure works in respect of the newsprint mill which included the columns, floor slabs and building works ('the superstructure works'). PMSB had proceeded on with the foundation works and superstructure works simultaneously where possible.

[12] After dynamic integrity tests were carried out on a total of 12 piles the test results showed that the integrity of the piles was acceptable, but the piles might not carry the designed load. Static load tests were also carried out to determine if the piles could carry the designed load and the answer was in the negative. These piles would be unable to carry that designed load of 650 tonnes each. It was recommended thereafter that in order to avoid excessive settlement, the load carrying capacity of the piles be down rated to a safe working load of between 200 and 300 tonnes each, depending on the depth of the pile. It was then concluded that although the Bored Pile Foundation as built may be sufficient to support the superstructure of the newsprint mill, it would not be sufficient to carry the total weight of the newsprint mill once the machinery for the paper machine, equipment and stock preparation plant were installed without there being acceptable settlement. By the time the defects in the Bored Pile Foundation were confirmed, the superstructure works were already very much in progress.

[13] As excessive unacceptable settlement and possible collapse of the newsprint mill was imminent due to the defects in the Bored Pile Foundation, it was therefore necessary to proceed with the rectification work. Remedial works were carried out in the form of micropiling. They were carried out on or about December 1997 and completed on or about March 1998 wherein a total of 388 micropiles were installed. It was necessary in the course of the rectification work to damage and remove portions of the building of the newsprint mill, hence causing collateral damage in order to have those micropiles installed.

[14] As per the pleadings, the appellant had alleged that the rectification works consisted of reasonable precautions undertaken to prevent the occurrence of further and more substantial damage to the newsprint mill, which could form the subject of a larger claim under the policy. Reasonable action was necessary in order to minimize the loss and damage in relation to the newsprint mill.

[15] The appellant had also averred, purposefully to counter the effect of clause 7 i.e. to exclude indemnification given under s 3(a) of the policy that the collateral damage was unintended damage as, inter-alia, like the rectification works the collateral damage was not to damage the newsprint mill but in fact to prevent any excessive settlement and possible collapse of the newsprint mill.

[16] In view of the defects in the Bored Pile Foundation and the collateral damage, the appellant had suffered substantial loss by way of the costs of the rectification works and other costs associated therewith. The works had interfered in the construction of the newsprint mill resulting in a delay in the commencement of its business hence causing the appellant to suffer further loss and damages.

[17] The appellant thereupon had filed the above application, praying for a declaration that the loss and damage suffered by it, arising from the defective design materials, were covered under the abovementioned Project Insurance Policy No H809415/97. Further the appellant had prayed, that the loss and damage or any other loss recoverable under the said policy be ascertained, determined and assessed by the court at the trial of the action; and that the respondents do pay to the appellant in certain proportions viz. the first respondent to pay 75% for loss and damage, and the second and third respondents to each pay 12.5%, together with interest thereon from such date and at such rate as the court thinks fit.

[18] At the outset, the first respondent had stated that the appellant's claim was wholly unsustainable and misconceived in law and in fact. The reasons for this stance are found in the very s 3(a) of the Project Insurance Policy No.1 IE-809415/97 itself.

[19] In a gist the respondents, inter alia, had submitted that it would only indemnify the appellant in respect of physical loss of or physical damage to any of the insured property arising during the period of insurance from any cause whatsoever subject to specific exclusions in the policy. Pertaining to this the first respondent had contended that there was no indemnifiable physical loss or damage to the insured property in this case as envisaged in the policy. It asserted that when constructing the bored piles on the insured property, defective design materials had been used with bad workmanship thrown in.

[20] By so using such defective design materials and hence failing to comply or meet with the original design specifications a necessity arose to repair and rectify the works already done. This scenario of supplying defective and inadequate design material was anticipated and excluded by exclusion 7 of s 3(a) of the said policy. For the full provision see the

'application/summons-in-chambers' under para 1.2. This factual matrix was not denied and in fact openly admitted by the appellant itself in the written submission, the agreed facts and even in the statement of claim (paras 24 and 25).

[21] Apart from exclusion 7 the respondents had adverted to the additional general exclusion cl 4 & 4(b) to support its stance.

[22] General exclusion cl 4 reads as follows:

> The insured shall at all times take all reasonable precautions to prevent any occurrence which may form the subject of a claim and take and cause to be taken all reasonable precautions in the selection of labour, and at all times observe all applicable, statutory requirements and maintain in efficient condition all plant and appliances used in connection with the project. In the event of any occurrence giving rise to loss or damage the insured shall take such immediate action as is necessary to minimize the loss.

[23] The first respondent had also contended that, even if the removal of portions of the building of the newsprint mill in the course of the rectification works constituted damage, as understood in a commercial policy of insurance, such damage resulted from a willful act of the appellant. The respondent had averred that such removal and destruction of the superstructure was a deliberate act adopted by the appellant to rectify the defects due to the defective design material and workmanship. Those damages were the natural and direct consequence of the appellant's deliberate acts that were foreseeable and intended by the latter and were not 'unintended' or fortuitous. In the circumstances of the case the appellant therefore must fail in its attempt to recover any compensation under the policy.

THE AGREED FACTS

[24] They are as follows:

(1) The defendants issued Project Insurance Policy No. 1 IE-809415/97 to various entities including the plaintiff for the period from 25 March 1997 to 31 March 1999 ('the Policy Period') plus various maintenance periods ('the Policy') with respect to the design, construction and maintenance of a newsprint production facility, including all associated and ancillary work in connection therewith and including the power plant facility to be constructed adjacent to the newsprint facility, situated on Lot 3771 in the mukim of Mentakab in the Temerloh Industrial Estate in Pahang ('the Newsprint Mill').

(2) Pursuant to the policy, the defendants agreed, inter alia and subject to the terms, conditions and exclusions of the Policy, to indemnify the plaintiff.

(2.1) Pursuant to s 3(a) of the Policy in respect of physical loss of or damage to the Newsprint Mill arising during the Policy Period;

(2.2) Pursuant to s 4(b) of the Policy in respect of the continued payment of standing charges plus increased cost of working as specified in the Policy in consequence of interference in the construction of the Newsprint Mill ('the Interference') resulting in a delay to the scheduled date of commencement of the plaintiffs business at the Newsprint Mill ('the Delay') provided that the Interference and Delay were caused by physical loss of or damage to the Newsprint Mill which is indemnifiable under s 3(a) of the Policy.

(3) The plaintiffs' contractors undertook the bored pile foundation ('Bored Pile Foundation') and pile cap works ('the Foundation Works') and the construction of the columns, floor slabs and superstructure ('the Superstructure Works') for those parts of the Newsprint Mill which were to house the paper machine, ancillary equipment and stock preparation plant.

(4) After completing the Foundation Works and prior to completing the Superstructure Works, the plaintiff discovered that the Bored Pile Foundation was unable to withstand the design load ('the Defects').

(5) The defects were caused by or resulted from defects in the design materials or workmanship of the Newsprint Mill.

(6) The plaintiff rectified the defects by installing 388 micropiles around and through the pile cap in the area where the paper machine was to be located so as to increase the load carrying capacity of the Bored Pile Foundation in that area ('the Rectification Works').

(7) In the course of undertaking the rectification works, the plaintiff broke and removed some parts of the surrounding reinforced concrete floors and floor drains and the subfloor fill above and around the pile cap.

(8) The plaintiff has made a claim under the Policy.

A BRIEF OVERVIEW OF THE LAW

[25] Zeroing in on the scope of the policy, it is our view that to appreciate the problem at hand, there is a need to discuss the law first as regards construction of any written contract. The intention, as documented in this contract, would have to be gleaned from the very words used in it and their meanings. What they meant it to be cannot be equated with that intention.

Given that each case turns upon the particular wording of the contract, His Lordship Edgar Joseph Jr. in the case of *Morello Sdn Bhd v Jacques (International) Sdn Bhd* [1995] 1 MLJ 577 at p 589 had occasion to remark:

> For the purposes of construction of contracts, the intention of the parties is the meaning of the words they have used. In *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] AC 235; [1973] 2 All ER 39; [1973] 2 WLR 683, Lord Simon of Glaisdale approved the following passage in *Norton on Deeds* (2nd Ed) at p 50:
>
> …..the question to be answered always is, 'What is the meaning of what the parties have said?' not 'What did the parties mean to say?' … it being a presumption juris et de jure … that the parties intended to say that which they have said.

[26] It is also quite established that when interpreting the meaning of the words used in a contract they should be construed in their grammatical and ordinary meaning, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy (*The Interpretation of Contracts by Kim Lewinson, Sweet & Maxwell 1989*).

[27] At the risk of being repetitive, the appellant had consistently ventilated that the phrase 'physical loss of or damage to any of the insured property' under discussion and embedded in s 3(a), must be interpreted to include any latent damage and/or economic damage to the newsprint mill primarily because of the format of the policy. The appellant had submitted that the above phrase included non-physical matters, as inter alia, 'design, construction and maintenance' were provided for in the Schedule of the policy. And this was apart from other alleged obvious factors, in the like of the title of the policy reading 'Project Insurance Program' rather than limited to say, 'building of the newsprint mill, and that it was an 'ALL RISKS INSURANCE OF CONTRACT WORKS'. In a gist the insured property here was not necessarily physical property.

[28] Opposed to the above view was the argument by the respondents that those defects were manifest defects emanating from the design materials and must be excluded under the abovementioned exclusion 7 of s 3(a), s 4(b) of the policy and under general exclusion 4. As the issues of latent defects and latent damage did not arise here, all the alleged losses therefore were not indemnifiable in the circumstances of the case.

[29] Before proceeding further let us briefly discuss the sustainability of this alleged 'All Risks' policy vis-à-vis the relevant exclusion cl 7. The appellant had obliquely attempted to ventilate that this impugned policy was an 'All Risks Insurance of Contract Works', it being a 'Project Insurance Policy' and not a mere normal property insurance (p 33 paras 70 and 84.3 of the appellant's submission). By this argument the insurance policy was supposed

to provide a total coverage for any losses and damage to property and thus rode rough shod over the exclusion clause. We were unconvinced with that submission, as it was premised on unsubstantiated nomenclature and high sounding titles; to succumb to such a simplistic view would signal the death knell of exclusionary clauses bearing in mind that those assertions were yet to be evidentially established. Even though it is well established that the onus lies on the insurer, if it wishes to seek solace from an exclusion clause, it is still incumbent upon the insured to establish its case. Unless established, the appellant here would 'achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract (Dominion Law Reports Vol 112 Consolidated *Bathurst Export Ltd v Mutual Boiler & Machinery Insurance Co* 112 DLR (3d) 49)'.

[30] To deny the legitimacy and effectiveness of that exclusion clause for which it was designed would render it meaningless (*B C Rail Ltd v American Home Assurance Co* [1991] 79 DLR (4th) 729). In *Canadian National Railway Co v Royal and Sun Alliance Insurance Co of Canada* [2007] OJ No 1077 the court had held at para 117:

> An 'all risks' policy of property insurance, like any other insurance policy represents an agreed allocation between an insurer and an insured of those risks that the insurer is prepared to underwrite and those that are to be borne by the insured. Insurance policies of this type provide broad coverage for losses and damage to property. *But they do not provide coverage against all conceivable perils. Obviously, were it otherwise, there would be no role for coverage exclusions* (Emphasis added.)

[31] It must be understood that insurance generally covers a risk, not a certainty and if something untoward befalls the insured subject matter it must not be brought about by the act of the insured (*British and Foreign Marine Insurance Company Limited v Gaunt* [1921] 2 AC 41; *Siang Hoa Goldsmith Pte Ltd v The Wing On Fire & Marine Insurance Co Ltd* [1998] 2 SLR 777). Here, where was the uncertainty, risk or latent defect in respect of the physical loss or damage to the insured property as submitted in the circumstances of the case?

[32] By analogy, no special knowledge is needed by any man on the street to conclude with certainty that if defective design materials were deliberately used in the construction of the Kuala Lumpur Twin Towers, that building would be unable to withstand the test of time. Incompetence would merely accelerate its destruction. In the current case, there was nothing latent in the physical loss, as all the damage and losses were the natural and direct consequence of an intentional acknowledged usage of defective design materials by the appellant. In a gist the losses, which were foreseeable and

A anticipatory, emanated from the very act of the insured. If the appellant still insists on recovering its losses then its attention should be diverted to some other responsible party.

B **[33]** Let us now consider a few cases. In *Lips Maritime Corporation v National Maritime Agencies Co* [1986] 6 Llyod's 641, the court had occasion to discuss a clause which was one part of a sentence in an amended Norwegian sale contract. The clause in question contained the words:

> C The Vessel is to be delivered... free of recommendations and average damage or defects affecting class….

[34] The question that arose there was whether the adjective 'average' was to be interpreted as governing the noun 'damage' only or whether it also governed the additional noun 'defects'. The court had opined that despite the D usage of the disjunctive 'or' the word 'average' only governed 'damage'. Bingham J had approached the matter in a rather sensible way when he stated in the following manner:

> E Often, of course, an adjective used as the adjective 'average' is used here governs both the nouns which follow as, for example, in a sentence such as 'the guests consisted exclusively of rich young men and women'. But it is not a necessary reading as in the sentence 'The guests consisted exclusively of prosperous lawyers and judges'. *All depends on the words used and the context in which they are used*. (Emphasis added.)

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[35] In *Moore v Evans* [1918] AC 185, a London firm of jewellers had insured their stock of jewellery by a non-marine policy for a year from 8 January 1914, against 'loss of and/or damage or misfortune to' the goods or any part thereof arising from any cause whatsoever …' It was quite obvious G that the terminology 'physical' was not provided for in the policy. Lord Atkinson had said:

> H Theft or dishonesty on the part of any of the appellants' customers cannot, of course, be presumed, but if it did take place the appellants would not in the cases specified have any right to recover. *In the enumeration of the perils insured against the words 'damage to the property' must mean, I think 'physical injury' to the property……* (Emphasis added.)

[36] In *BC Rail Ltd v American Home Assurance Co* [1991] 79 DLR (4th) I 729 the court had occasion to discuss an 'all risks' policy with the perils insured to read as follows: 'This section of the policy insures against all risks of physical loss or damage from any cause except as hereinafter excluded.' Cumming JA had accepted the submission that the word 'physical' in the above provision applies to both words 'loss' and the word' damage'.

[37] After having considered the meaning of the impugned phrase in s 3(a) and exclusion 7, regretfully we were unable to agree with the view of the appellant regarding the governing word 'physical' vis-à-vis the words 'loss and damage'. Apart from the outright admissions made, our findings were vindicated further by the clear words of the exclusion clause. The words in their grammatical and ordinary meaning were easily definable, what with no absurdity, inconsistency or repugnancy in arriving at such a straightforward interpretation. It was so sensible that it must follow that the word 'physical' must also govern 'damage' and not just restricted to 'loss'.

[38] The sum total of our conclusion was that:

(i) we were satisfied that the agreed facts adduced were more than sufficient for the court to allude to O 14A of the Rules of the High Court 1980 to enable the court to summarily resolve the matter without the chore of a full blown trial;

(ii) exclusion 7 is enforceable;

(iii) there was physical damage to the insured property but the cause of the defective foundation came from defective design materials or incompetent workmanship. The first limb of exclusion 7 disallows any recovery of any expended costs for remedial works pursuant to those type of defects;

(iv) the alleged latent defects canvassed by the appellant were not covered by cl 3(a) of the policy;

(v) further, the tearing down of parts of the building was not an unintended damage but an intentional resultant damage that came about from remedial works performed by the appellant. The second limb of exclusion 7 disallows such recovery; and

(vi) lastly in the circumstances of the case, the first limb of exclusion 7 read together with the general exclusion cl 4 of the policy, disallows recovery of expenses due to poor workmanship and delay.

[39] On the above grounds we had dismissed the appeal with costs. The orders of the High Court were affirmed and the deposit ordered to be paid out to the respondents to account of their taxed costs.

Appeal dismissed with costs.

Reported by Dipendra Harshad Rai